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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 261

CARL MICHAEL MIRABILE,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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# Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

CARL MICHAEL MIRABILE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Carl Michael Mirabile prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered April 14, 1964, affirming a judgment of conviction and sentence of the United States District Court for the Southern District of Texas.

## OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals are reported as *Mirabile v. United States,* 330 F.2d 676 (1964). They are printed as Appendix A hereto.

## JURISDICTION

On April 14, 1964, after deliberating for more than six months after oral argument, the Court of Appeals for the

Fifth Circuit, over the dissent of Circuit Judge John R. Brown, affirmed the conviction of Petitioner of conspiracy to import marihuana in violation of 21 U.S.C.A., Sec. 176a. A timely filed petition for rehearing was denied on May 11, 1964, and on June 4, 1964, Mr. Justice Black entered an order granting an extension of time within which to petition for certiorari to and including July 10, 1964.

Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C.A., Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Petitioner was deprived of his constitutional right to a trial by an impartial jury or was otherwise prejudiced when the District Judge, at the request of a disappointed prosecutor, shortly before the trial of this case, in front of the entire panel of jurors, summoned to his chambers four jurors who had recently acquitted a defendant for the obvious purpose of inquiring into the deliberations which had resulted in the acquittal.

2. Whether the majority of the court below departed from prior decisions of this Court and of the Courts of Appeals in affirming the conviction of the Petitioner, where the prosecutor, in an admittedly close case, persisted in calculated misconduct consisting: a) of improper cross-examination and argument which suggested, without evidence, that the Petitioner was a panderer and was otherwise so unsavory and contemptible that he was capable of committing the crimes alleged, and b) of repeated suggestions that the Petitioner was guilty of alleged prejudicial conduct not in evidence and about which the prosecutor had no intention of offering evidence.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States and the statute codified in 21 U.S.C.A., Section 176a, and they are set forth as Appendix B hereto.

## STATEMENT OF THE CASE

Carl Michael Mirabile, who is the Petitioner herein, and a co-defendant named Nicholas Borozzi were charged in a three count indictment returned by the Grand Jury for the Southern District of Texas, with a) conspiring, in the Southern District of Texas, to smuggle marihuana into the United States, in violation of 21 U.S.C.A., Sec. 176a; b) smuggling marihuana into the United States, in violation of 21 U.S.C.A., Sec. 176a; and c) transporting marihuana into the Southern District of Texas without paying the transfer tax imposed by the Internal Revenue Code, in violation of 26 U.S.C.A., Sec. 4744(a)(2).

The case was assigned for trial at a short term of Court which began on September 10, 1962 in Laredo, Texas. The jury panel selected for service during that term consisted of only forty-seven persons, most of whom were residents of the small city of Laredo. All of the cases were tried by the same District Judge. On Friday, September 14, 1962, the entire panel was assembled in Court for the selection of the first jury to serve in that term (R. 8). Twelve jurors were selected for a criminal narcotics prosecution, and, after a brief trial, the case was submitted to the jury that afternoon. The Defendant was acquitted after the jury had deliberated for only eleven minutes (R. 11). On the ensuing Monday, September 17, 1962, the first working day after the unusually swift acquittal, the

entire panel was once again assembled, this time for the selection of a jury for a second narcotics prosecution. The jurors who had acquitted the defendant in the first case were not among those selected for the second trial, and, at the request of the United States Attorney, after the jury for the second trial was selected, while the entire panel was still in the courtroom, the District Judge singled out by name the first four of the twelve jurors who had just recently voted for an acquittal, calling them to his chambers (R. 14, 15).

In the context in which the four jurors were publicly summoned for a conference, it was evident to counsel for the Petitioner, who was present in the courtroom at the time, that they were being called to discuss and explain the deliberations which had resulted in the acquittal, and, perceiving no reason why it should not have been equally apparent to the jury panel, all of whose members were also present, the Petitioner filed a motion to quash and disqualify the panel (R. 7-12).

At the hearing held on the motion it was proven that the jurors had, in point of fact, been called to the Judge's chambers for an explanation of the acquittal. The Judge told them that it had occurred to him that the jury had returned a verdict rather hastily, and he asked if the jurors, in their deliberations, had given the case thorough consideration (R. 21). He also asked the jurors if they had any reason to believe that any juror might have received any outside influence or if they knew of anything improper which might have gone on in the jury room (R. 22). The four jurors, when questioned at the hearing, said that they had not revealed their conversation with the District Judge to the other jurors, and the Judge offered to ask the panel "If they received any communication

from the four as to the fact that the Court gave the four of them any instructions as to handle any future case, or anything of the sort, that might react adversely'' (R. 20). Counsel for the Petitioner replied, however, that a voir dire examination of that sort would, itself, be prejudicial and would only remind the panel once more that four of their members had been singled out and called into chambers after returning a verdict of not guilty, and the offer was, therefore, declined (R. 20, 21). The motion was denied (R. 17).

The four jurors were removed from the panel available for the Petitioner's case. The practice in the District Court was to assign a permanent number to each member of the panel, and, when assembled for jury selection, they were seated in order. When the panel was assembled for the trial of the Petitioner's case, the four spaces previously occupied by the jurors who had been called to the Judge's chambers were vacant (R. 25).

The Petitioner's trial began on the afternoon of September 23rd and it was concluded before the end of the next day. The co-defendant, Borozzi, entered a guilty plea to the alleged revenue violation shortly before the trial, and the Petitioner was tried alone. At the conclusion of the case, the District Judge remarked that the evidence had shown ''rather conclusively that it was Borozzi and not Mirabile who did the actual smuggling,'' and only the conspiracy count was submitted to the jury for its consideration (R. 173). The Petitioner was convicted of this charge, and, thereafter, he was sentenced to a five-year term of imprisonment.

Even on the conspiracy charge the case was a close one. It was agreed that in the first days of April, 1962, the

Petitioner and Borozzi took a trip from Baltimore, Maryland to Mexico, and that, on the evening of April 10th, Borozzi alone was arrested after he crossed the Rio Grande near Laredo, Texas, with a suitcase full of marihuana. The Petitioner did not dispute the fact that he had been with Borozzi. He maintained that he went to Mexico for various pleasures (R. 104-105, 122-123, 132); that he did not discover that Borozzi was engaged in a criminal enterprise until he was in Mexico with him (R. 112-114); that he balked at smuggling the marihuana which Borozzi had purchased (R. 115); that he abandoned Borozzi in Nuevo Laredo, Mexico on the morning before Borozzi smuggled it (R. 115); and that, at the time that he entered the United States, he was not associated with Borozzi's venture (R. 116).

Borozzi was not called as a witness for the prosecution. The principal Government witness was a man named Hector Rodriguez, Borozzi's self-confessed accomplice, a man who, for some unexplained reason, was never prosecuted. Through him the Government introduced the only direct evidence linking the Petitioner to the alleged conspiracy (R. 25-61). The Petitioner testified in his own defense and he denied participation in the smuggling or in the conspiracy (R. 104, 137). Essentially, the trial was a test of the relative credibility of these two witnesses.

The cross-examination of the defendant was marked by unjustified insinuations and accusations, some of which were wholly irrelevant to the charge and none of which were followed by any evidence. The prosecutor repeatedly suggested that facts prejudicial to the Petitioner but not in evidence were known to the Government, among which were the following: that the Petitioner was a panderer

(R. 120-122); that the Petitioner, even at the time of trial, was guilty of immoral conduct and was sharing his hotel room with a girl named Jacqueline Gay (R. 132); that the Petitioner, and not Borozzi, initiated the smuggling scheme and planned it (R. 124-125); that the Petitioner knew narcotics traffickers in Mexico (R. 124-125); and that the Petitioner's friendship in Baltimore with a man of apparent Spanish extraction named Hernandez assumed some sinister significance in this case (R. 124-125). At the conclusion of all the evidence, and prior to argument, counsel for the Petitioner protested to the District Judge that the prosecutor was attempting "to bring in all sorts of misconduct not a part of this indictment," but the Judge declined to act (R. 138, Tr. 192). The prosecutor, unrestrained, continued to employ the same tactics, and, in his final argument when Petitioner had no opportunity to reply, in answer to the argument of the defense that the Government had failed to show that the Petitioner had an available market for the large amount of marihuana in the case, he declared, without evidence, that the Petitioner was "working" a prostitute and that, therefore, "he could certainly get rid of it" (R. 166). An objection to the argument was sustained without comment or admonition, and the Petitioner then moved for a mistrial (R. 166). The motion was promptly overruled, and the prosecutor then abandoned the record altogether and expressed his personal belief that the Petitioner had a ready market for marihuana in Baltimore (R. 166-167). Some time later, toward the end of his charge, the District Judge repeated the prejudicial comments, erroneously telling the jury that there had been "testimony" in the record which suggested that the Petitioner was living in part off the earnings of a prostitute, and he simply "asked" the jurors not to consider it (R. 181).

The conviction was affirmed by a divided panel. The majority of the panel, while voting to affirm the conviction, recognized that the evidence against the defendant was not overwhelming and that "in the main the government's case rested on the testimony of Hector Robles Rodriguez, a citizen of Monterrey, Mexico, who acted as a go-between in the sale of marihuana to Borozzi." (App. 2) They declared moreover, that "this case was prosecuted with a zeal which approached bounds of impropriety" and that they "do not condone the type of tactics here engaged in by the prosecutor, with their tendency to lead to error." (App. 3) Because of the belated and highly questionable admonition by District Judge, however, the majority, over the dissent of Judge Brown, found no reversible error. Judge Brown, on the other hand, viewing the record in its entirety, expressed the view that "the improper examination of the defendant coupled with the inflammatory remarks made by the prosecutor in argument constitute prejudicial error," and he felt compelled to conclude that the case was one "in which the only one hurt gets no relief". (App. 4, 5).

## REASONS FOR GRANTING THE WRIT

1. "A juror," the Court said in *Remmer v. United States*, 347 U.S. 227, 229 (1954), "must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder." As Professor Wigmore observed, moreover, jurors' "communications originate in a confidence of secrecy" and "this confidence is essential to the due attainment of the jury's constitutional purpose." VIII Wigmore, Evidence (McNaughton Rev., 1961), Sec. 2346, p. 678. See also: *Gold v. United States*, 352 U.S. 985 (1957); *Brasfield v. United States*, 272 U.S. 448 (1926). Even where there is suspected wrongdoing on the jury, the mere charge

of impropriety is insufficient to permit the Judge to inquire into its deliberations, for, as Mr. Justice Cardozo said, "Freedom of debate may be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world . . . There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in." *Clark v. United States,* 289 U.S. 1, 13-14 (1933).

Jurors observe the actions of the District Judge with keen perception, and, as the Court noted in *Starr v. United States,* 153 U.S. 614, 626 (1894), his "lightest word is received with deference and may prove controlling." Mindful of the lesson of *Starr,* Chief Judge Steckler of the Southern District of Indiana, in discussing the manner in which a Judge, if the necessity arises, should confer with jurors, has cautioned that they should be "privately notified" after the others have been "discreetly excused" and that "Great care should be exercised to avoid arousing the curiosity of the other jurors . . ." Steckler, *Managing the Jury,* 29 F.R.D. 190, 194. The public summons to the Judge's chambers of the first four members of a jury that had just voted for an acquittal could not, as suggested by the court below, have gone unnoticed, for nothing could have aroused the curiosity of the panel more. Cf. *McLendon v. United States,* 2 F.2d 660 (6 Cir., 1924).

Without approving or disapproving of the District Judge's act, the court below held only that no prejudice resulted from it, relying heavily upon the Petitioner's rejection of the Judge's offer to question the entire panel about his conversation with the four jurors. This holding is in direct conflict with that of the Sixth Circuit in *Boyles v. United States,* 295 F. 126 (6th Cir., 1924). In the *Boyles* case, the defendant challenged the entire panel after the

Judge, in a prior case, discharged a juror named Mahannah who had voted to acquit him. The Government argued to the Court of Appeals that the record showed "no voir dire examination of the jurors on the second trial with respect to their knowledge of the Mahannah incident and its effect upon them," but the Court replied that "a voir dire examination of the nature suggested would not improbably be of itself more or less prejudicial." The harm produced by judicial interference, *Boyles* teaches, cannot be removed by a further reminder that it had occurred.

The opinion of the court below suggests, moreover, that it was the burden of the Petitioner to prove that an actual, definable prejudice resulted from the judge's act. Once there has been interference with the jury, however, such error is reversible ". . . if within the range of reasonable possibility it may have affected the verdict, [and] the accused does not have the burden of showing an adverse effect." *Bacino v. United States,* 316 F.2d 11, 14 (10 Cir., 1963). Cf. *Remmer v. United States,* 347 U.S. 227 (1954); *Rice v. United States,* 149 F.2d 601 (10 Cir., 1945); *Holmes v. United States,* 284 F.2d 716 (4 Cir., 1960).

2. The majority of the court below has ignored the holdings in similar cases, in the Fifth Circuit and elsewhere, that irrelevant suggestions of immoral conduct are highly prejudicial and cast doubt upon the ability of the accused to secure a fair trial. In *Brown v. United States,* 202 F.2d 474 (5 Cir., 1953), where a police officer, while testifying in a marihuana tax case, volunteered that he had arrested the defendant's wife at different hotels, the Court of Appeals held that the remark was "highly prejudicial" and that, in the new trial which was awarded to the defendant, "the incident should not be repeated." The

incident was repeated in the trial of the present case, this time with success. Similarly, in *Ingram v. United States,* 106 F.2 683, 684 (9 Cir., 1939), where the defendant was prosecuted for illegal possession of morphine and the principal witness on his behalf was his wife, and where the prosecutor cross-examined her "as to claimed improprieties in her conduct, inconsistent with that of a continued marital relationship," the Court in reversing the conviction declared: "It is obvious that the main purpose of entering into this inquiry, irrelevant to the direct examination, was to degrade her in the minds of the jury. The prejudicial effect of the questions is obvious." See also: *United States v. Lefkowitz,* 284 F.2d 310, 314 (2 Cir., 1960); *La Feber v. United States,* 59 F.2d 588, 590 (8 Cir., 1932); *United States v. Cohen,* 177 F.2d 523 (2 Cir., 1949).

3. The majority of the court below, in declining to infer that prejudice resulted from the misconduct of the prosecutor, has refused to follow the recent holding of another panel in the same Circuit in *Dunn v. United States,* 307 F.2d 883 (5 Cir., 1962). Dunn, the mayor of Baxley, Georgia, was charged with income tax evasion. The Government's theory was that the defendant failed to report income received in the form of kickbacks from suppliers who performed work and furnished goods to that city. The prosecutor's misconduct consisted of a comment, in his opening statement, that the case was replete with fraud and an insinuation, in his final argument, that because the defendant was a politician he must have taken the alleged kickbacks. The defendant's attorney objected to the insinuation and moved for a mistrial. The motion was denied and the Judge promptly admonished the jury to "disabuse your minds of that". On appeal, the Fifth Circuit reversed the conviction, holding that the remark was

prejudicial, that a mistrial should have been declared, and that the Judge's admonition could not have cured the error.

Noting the difficulty of undoing the effect of such prejudicial misconduct by an instruction to disregard, the Court, in *Dunn*, said: "Otherwise stated, 'one cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound': and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'." 307 F.2d 883, 886. Cf. *Jackson v. Denno, Warden,* ..... U.S. ....., 32 LW 4620, 4626, n. 15 (June 22, 1964), where Mr. Justice White, for the Court, quoted with approval the comment of Mr. Justice Frankfurter, in his dissent in *Delli Paoli v. United States,* 352 U.S. 232, 248 (1957), that "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds," as well as Mr. Justice Jackson's observation that the "naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States,* 336 U.S. 440, 453 (1949) (concurring opinion).

In the instant case, the misconduct was more pronounced and persistent than that found in *Dunn.* In *Dunn,* moreover, it was conceded that the defendant was a politician and the jury was only asked to draw one impermissible inference, i.e., that politicians take kickbacks. In the present case, the jury was told to take the prosecutor's word that the defendant was a panderer, and, once having agreed with that unproven assertion, to accept the argument that all panderers have a market for marihuana. Cf. *Handford v. United States,* 249 F.2d 295 (5 Cir., 1957).

4. The majority of the court below has failed to follow *Berger v. United States*, 295 U.S. 78 (1935). In a factual context strikingly similar to that presented here, Mr. Justice Sutherland, in *Berger*, speaking for the Court, declared:

> "The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.
>
> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." 295 U.S. 78, 88-89.

The bounds of propriety, the *Berger* case teaches, are clearly exceeded when a prosecutor, in the conduct of a cross-examination, is guilty "of misstating the facts" and "of assuming prejudicial facts not in evidence". *id.* p. 84. His argument to the jury, moreover, may not contain "improper insinuations and assertions calculated to mislead the jury." *id.* p. 85. Jurors have confidence in the prosecutor's observance of his duty of fairness to the accused, and, "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *id.* p. 88. Where the evidence of guilt is not "overwhelming" and the misconduct is "persistent," *Berger* holds, the prejudicial effect cannot be removed by "mild judicial action".

5. The majority of the court below has rejected the rule announced in *Salerno v. United States*, 61 F.2d 419, 424

(8 Cir., 1932), that "When, in the prosecution of a defendant, counsel for the government indulges in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the Government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have." The holding of the majority below is likewise contrary to *United States v. Pennix,* 313 F.2d 524, 531 (4 Cir., 1963). The Government urged the Court of Appeals for the Fourth Circuit to embrace the view of the majority below, but the Court there declared:

> "The Government insists that, even admitting that the cross-examination of the defendant was improper, it was not so prejudicial to the defendant as to constitute prejudicial error. But it is clear that here the primary issue for jury determination was the conflict between the testimony of Pennix, on the one hand, and that of the two self-confessed bank robbers, on the other. Thus, the credibility of witnesses was sharply brought into focus and any error which reflected upon or tended to impeach the credibility of the defendant may not be said to be insubstantial."

6. The opinion of the majority below is in error in its recitation of essential facts and fails to consider other facts which demonstrate the aggravated nature of the prosecutor's conduct:

a) The majority opinion states that the improper cross-examination was conducted without objection. This statement is in error. When the prosecutor began to question the defendant with respect to the woman who was said to be a prostitute, the inquiry drew objection. Counsel for the defendant pointed to the irrelevancy of the inquiry and, going further, asked for a conference at the bench. His

protests were ignored, however, and the District Judge instructed the prosecutor to "go forward". The following is an excerpt from pages 120 and 121 of the record:

"Q. When was the last time you worked as a bartender? A. That's what I am doing now.

Q. But prior to the time that you came down here with Borozzi? A. I was working in a bar, as a bartender.

Q. How many hours a day did you work there? A. About ten hours a day, I guess.

Q. Did you have any other means of income? A. None.

Q. You had no other income besides that that you made as a salary as being a bartender, is that right? A. That's right.

Q. Do you know a woman by the name of Sarah Shapiro? A. Yes, I do.

Q. Do you know her name also as Sally O'Malley? A. Right.

(Mr. Weiner) Objection. I don't know what they are aiming at.

(The Court) I don't either.

(Mr. Weiner) It might be something that—I would like to have a conference at the bench, if your Honor please. There might be something there; I don't know what they are going to bring out.

(Mr. Cook) Your Honor, the Defendant has stated he had no other means of income. We intend to show he does have other means of income.

(Mr. Weiner) Well, first they ask him, then they want to rebut something that they themselves are raising.

(The Court) You may go forward.

Q. What—you say you do know her? A. Yes, I do.

Q. You know her by which name? A. Well, Sarah Shapiro.

Q. Do you also know her by Sally O'Malley? A. Sally O'Malley?

Q. What is her occupation? A. She is a barmaid at the Villanova Night Club.

Q. She is also a prostitute, is she not? A. I don't know.

Q. You don't know; you have never received any money from her?"

The record clearly demonstrates that objection to the line of inquiry was made in a diligent manner. The majority of the panel below, however, has either overlooked this aspect of the record or has decided, without voicing it, that it was the duty of the Petitioner's counsel to repeat his objection to each and every question asked on this subject. If the latter is true, the court below has applied a rule of evidence which is in general disrepute and which, as Professor McCormick has said, is "a practice which places . . . [the lawyer] . . . in the invidious semblance of a contemptuous obstructor, and conduces to waste of time and fraying of patience. Most courts hold that . . . [the lawyer] . . . is entitled to assume that the judge will continue to make the same ruling and that he need not continue the objection." McCormick, Evidence (1954), Ch. 6, Sec. 52, p. 120. See also: *Union Electric Light and Power Co. v. Snyder Estate Co.*, 65 F.2d 297 (8 Cir., 1933); *Tucker v. Reil*, 77 P.2d 203, 208 (Ariz., 1938); *Wilcox v. Sway*, 160 P.2d 154 (Cal., 1945); *Selz-Schwab & Co. v. Industrial Commission*, 156 N.E. 763 (Ill., 1927); *State v. Monninger*, 182 N.E.2d 426 (Ind., 1962); *Gardner's Adm'r v. Dale*, 219 S.W.2d 40 (Ky., 1949); *Shaneybrook v. Blizzard*, 121

A.2d 218 (Md., 1956); *Cook v. Kansas City*, 214 S.W.2d 430, 434 (Mo., 1948); *Bennett v. Gusdorf*, 53 P.2d 91 (Mont., 1936); *In re House's Estate*, 18 N.W.2d 500 (Neb., 1945); *Brady v. Stafford*, 152 N.E. 188 (Ohio, 1926); *Citizens Bank of Nevada v. Robison*, 323 P.2d 705 (Nev., 1958); *Webber v. Yaden*, 373 P.2d 1007 (Ore., 1962); *Crispi v. Emmott*, 337 S.W.2d 314 (Texas, 1960).

The majority of the court below, moreover, gives no weight to the affirmative duty of the trial judge to prevent such conduct as occurred here. As the Court held in *Viereck v. United States*, 318 U.S. 236, 248 (1943), where the prosecutor engaged in conduct which was "offensive to the dignity and good order with which all proceedings in court should be conducted," the "trial judge should have stopped counsel's discourse without waiting for an objection." Cf. *N. Y. Central R.R. Co. v. Johnson*, 279 U.S. 310, 318 (1926), where Mr. (later Chief) Justice Stone, on behalf of the Court, remarked that "a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy of no importance to the public'. The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

b) The majority of the court below has failed to acknowledge that when the prosecutor in the present case posed the series of suggestive questions on cross-examination which went to the very heart of the case and implied

that there had been conversations in Baltimore in which the Petitioner initiated the smuggling scheme, defense counsel had neither the obligation nor the right to object. Such assertions on cross-examination, Professor Wigmore has said, are proper if evidence of such facts is later to be produced by the cross-examiner. By undertaking the inquiry, the prosecutor impliedly represented to the court that "evidence about it . . . is pledged for future consideration." VI Wigmore, Evidence (3rd Ed.), Sec. 1807, p. 263, and Sec. 1808, p. 274. Cf. Canon 22, Canons of Professional Ethics. Defense counsel had the right to anticipate that such questions would be followed by evidence which would be subject to his cross-examination and upon which the jury could fairly pass. As the case developed, however, the Petitioner, on a highly relevant subject, was contradicted only by an unsworn and unseen witness.

c) The majority opinion below conveys the impression that the improper argument was due, in part at least, to the failure of counsel for the defendant to call upon the Judge, early in the trial, to impose restraint upon the prosecutor. The record, however, shows that this was not the case. Before the lawyers argued to the jury, a conference was held with the Judge in his chambers. Counsel for the Petitioner, at that time, complained about the misconduct of the prosecutor, saying: "Your Honor, they are trying to show the fellow is living with people in hotel rooms, and has a girlfriend named Sally O'Malley and I think that prosecution attempted to bring in all sorts of misconduct not a part of this indictment" (R. 138). Counsel for the Petitioner asked the Judge to admonish the Jury, but he declined to act at that time, saying only that he would think about the matter "a little bit" (Tr. 192). The improper argument occurred shortly thereafter.

d) The majority opinion below neglects to mention that

even the motion for mistrial failed to inhibit the prosecutor. After the Judge sustained the objection to the argument that the Petitioner was a panderer and therefore had a ready market for marihuana, the prosecutor abandoned the record altogether, and, expressing his personal opinion of the defendant's guilt, exclaimed: "'He had a ready market for it, *I'm quite certain of that,* he and Nicholas Borozzi both" (R. 166-167) (Emphasis supplied).

e) The majority opinion below fails to consider that the statement which the District Judge ultimately made, long after the argument, was itself in error. The Judge referred to the prosecutor's unsupported suggestion as if it were evidence in the case and, instead of firmly instructing the jury to disregard it, he simply requested them to do so. He said:

> "There has been *testimony* referred to in the argument by the Government's counsel which suggests that he perhaps was living in part at least off the earnings of a prostitute. He is not charged with *that offense.* It is an irrelevant matter which apparently crept in when I was unaware as to what was coming. I will *ask* you not to consider that *testimony* as to any circumstance for any purpose" (R. 181) (Emphasis supplied).

So often and forceful were the prosecutor's unsupported and unwarranted suggestions that even the District Judge was led to believe that there had been evidence of them. The jury could not have been expected to be more discriminating.

7. The Fifth Circuit, in *Fogarty v. United States,* 263 F.2d 201 (5 Cir., 1959), held that if misconduct in the course of argument can be cured at all, it must be by corrective action taken immediately upon the voicing of objection to the offensive remark, and that, therefore, a

motion for mistrial which is made at the conclusion of argument is too late. The District Judge in this case took no steps to exclude the objectionable remarks during the course of argument, although timely objection was made. Instead, he permitted them to be digested by the jurors and waited until the end of his charge before mentioning them. The majority of the panel in the present case disregards the prior holding of the same Court in *Fogarty*, and, by clear implication, holds that the Judge had no duty to act promptly and that the prejudicial effect of misconduct can be cured by any admonition. In doing so, the majority of the court below also repudiates the principle, discussed in *United States v. Bugros*, 304 F.2d 177 (2 Cir., 1962), that an attempt at curing improper comment by repeating it in the course of an admonition merely serves to aggravate its effect.

8. The majority of the court below fails to give effect to what the Court of Appeals for the Second Circuit recently described as, "one of the most fundamental notions known to our law—that a man is entitled to be tried only for specific charges explicitly stated, and should not be compelled to defend a lifetime of conduct." *United States v. Beno*, 324 F.2d 582, 587 (2 Cir., 1963). The defendant in this case was asked to defend himself against repeated charges of various acts of alleged misconduct, but his conviction was nevertheless affirmed.

## CONCLUSION

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted.

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Baltimore 2, Maryland.
*Counsel for Petitioner*

**APPENDIX A**

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

---

No. 20168

---

Carl Michael Mirabile,
Appellant,

*versus*

United States of America,
Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

---

(April 14, 1964.)

---

Before HUTCHESON and BROWN, Circuit Judges, and SIMPSON, District Judge.

---

HUTCHESON, Circuit Judge: Carl Michael Mirabile is here appealing from the judgment and sentence of the United States District Court for the Southern District of Texas, on his conviction of conspiracy to import marihuana, in violation of 21 U.S.C.A. Sec. 176a[1], for which he received a five year sentence.

[1] 21 U.S.C.A. Sec. 176a. "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Mirabile and Nicholas Borozzi were indicted in three counts for conspiring to smuggle marihuana, smuggling, and violating the revenue laws concerning marihuana transfers. Borozzi pleaded guilty to the revenue law violations, and Mirabile was tried alone. Only the conspiracy count was submitted to the jury. In the main the government's case rested on the testimony of Hector Robles Rodriquez, a citizen of Monterrey, Mexico, who acted as a go-between in the sale of marihuana to Borozzi.

The appellant does not, nor can he, assert that the evidence given by Rodriguez, bolstered as it was by that of other government witnesses, was insufficient. Instead he argues that the nature of the prosecutor's cross-examination of the defendant, coupled with that of his jury argument, was prejudicial and reversible error. He further asserts that the district court erred in failing to grant his motion to quash and disqualify the jury panel from which his jury was selected.

During the course of cross-examining the defendant, the prosecutor, attempting to determine the sources of Mirabile's income, asked if Sally O'Mally, a woman he knew as a bar maid, was also a prostitute. He answered, "I don't know". In connection with a series of questions designed to determine whether Mirabile had knowledge of sources of supply in Mexico and had planned the buying trip, Mirabile was asked the last name of a Baltimore friend. He answered, "Hernandez." These two questions to which the defendant now objects were not objected to during the course of the trial. Finally, while questioning the defendant, the prosecutor attempted to determine whether the defendant and his girl friend were sharing a room during the trial. This question was objected to, with the district judge commenting on its irrelevancy. It went unanswered. In closing argument, the prosecutor, in answer to the argument of the defense that the government had failed to show that Mirabile had a market for the large amount of marihuana involved in the case, argued that if the defendant was working Sally O'Mally, he would

have a market. This argument was objected to, the objection was sustained, a simultaneous motion for mistrial was overruled, and in the court's charge to the jury, instructions were given to disregard this as irrelevent.

This case was prosecuted with a zeal which approached bounds of impropriety, and we do not condone the type of tactics here engaged in by the prosecutor, with their tendency to lead to error. However, we find no reversible error. What error there was, if any, in the question and argument objected to was removed by the action of the trial judge, and, likewise, whatever error there might have been in the questions which passed without objection did not affect the substantial rights of the accused. Fed. Rules of Civil Procedure 52.

Seven days before defendant's trial, on September 17, 1962, the petit jury panel for the September term was excused for several days. In that panel's presence four of its members were requested by the district judge to meet with him that afternoon at 1:15. In his chambers the district judge asked these four jurors, who had three days before served on a jury which had acquitted a defendant charged with violation of the narcotics laws in eleven minutes, whether they had given the verdict in that case thorough consideration, whether any juror might have received outside influence, whether anything improper had gone on, and he told them that they had returned a verdict rather hastily. The defendant, upon learning this prior to his trial, moved to quash the September term panel, from which his jury was to be chosen. He is here contending that the public summons to these four jurors was a "demonstration to the entire panel that a vote for acquittal could result in a conference in the judge's chambers, and that a juror who voted for acquittal might expect to be called upon to explain his vote to someone outside the jury".

A hearing was held on this motion outside of the presence of the September term panel, in which the district judge removed the four jurors from the term panel available

for Mirabile's case. He also offered to examine or allow the defense to examine the remainder of the panel on the effect of the summons of the four to the judge's office. These offers were rejected. The four jurors were collectively examined by the defense during the hearing and testified that they had neither told nor been asked about their meeting with the judge.

In light of the precautions taken to insure that no prejudice resulted from the judge's actions, we hold that his summons to the four, made as it was in front of the entire panel, did not constitute error. Nor is there any indication of harm resulting from the absence of the four from the panel as it was assembled for jury selection in the Mirabile trial. We cannot infer that the members of the panel considered that the summons to the judge's office and the subsequent absence of the four from the panel were the result of criticism of the four jurors, and then infer that the panel was infected by this implied criticism of unknown nature in such a way as to be disqualified to serve on the defendant's jury.

The claim of error here is farfetched, indeed, frivolous. There being no substance in any of appellant's claims of error, the judgment is AFFIRMED.

BROWN, Circuit Judge, dissenting:

Because I believe that the improper examination of the defendant coupled with the inflammatory remarks made by the prosecutor in argument constitute prejudicial error requiring reversal, *Dugan Drug Stores, Inc. v. United States*, 5 Cir., 1964, 326 F.2d 835; *Hull v. United States*, 5 Cir., 1963, 324 F.2d 817; *Washington v. United States*, 5 Cir., 1964, ..... F.2d ..... [No. 20415, February 17, 1964], I respectfully dissent. *United States v. Cohen*, 2 Cir., 1949, 177 F.2d 523, 528 (dissenting opinion). The Court recognizes that the questions, to the certain professional knowledge of the prosecutor, were improper. All of this was compounded by the equally impermissible argument which drilled in the prior inadmissible testimony. The case seems

to be another in which the only one hurt gets no relief. *Cf. Tipton v. Socony Mobil Oil Co.*, 5 Cir., 1963, 315 F.2d 660, 662 (dissenting opinion), reversed mem., 1963, ..... U.S. ....., ..... S.Ct. ....., 11 L.Ed.2d 4.

## APPENDIX B

Amendment 6, Constitution of the United States of America:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S.C.A., Section 176a:

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570.

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No. 361

# In the Supreme Court of the United States

OCTOBER TERM 1964

CARL MICHAEL MIRABILE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
*Solicitor General,*
HERBERT J. MILLER, Jr.,
*Assistant Attorney General,*
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
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# In the Supreme Court of the United States

OCTOBER TERM 1964

---

No. 261

CARL MICHAEL MIRABILE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals is reported at 330 F. 2d 676.

### JURISDICTION

The judgment of the court of appeals was entered on April 14, 1964. By order of Mr. Justice Black, the time for filing a petition for certiorari was extended to and including July 10, 1964. The petition for a writ of certiorari was filed on July 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



740-265—64

## QUESTIONS PRESENTED

1. Whether the district court's interrogation, in chambers, of four members of the panel from which petitioner's jury was chosen with respect to an acquittal in an earlier case prejudiced petitioner's trial even though those interrogated were not on petitioner's jury and did not mention the interrogation to others on the panel.

2. Whether the cross-examination of petitioner and the government's closing argument required the declaration of a mistrial.

## STATEMENT

Petitioner and a co-defendant were indicted in the United States District Court for the Southern District of Texas for conspiracy to smuggle marihuana into the United States, the substantive offenses of smuggling and transporting marihuana without payment of the required transfer tax (21 U.S.C. 176(a), 4744(a)(2)). The co-defendant pleaded guilty. After a trial by jury in which the court submitted only the conspiracy count to the jury (R. 172–174), petitioner was convicted and sentenced to imprisonment for a period of five years (R. 187–188). The court of appeals affirmed, with one judge dissenting.

1. On September 14, 1962, ten days before petitioner's trial began, a jury in the same district court deliberated for eleven minutes, and then acquitted a defendant of failing to register with customs as a person previously convicted of a narcotics offense (R. 10–12). On September 17, when the panel from which that jury had been selected was reassembled, the

court excused the panel for three days, but asked four of those who had sat on the earlier case to meet with him at 1:15 p.m. Those asked to appear were called by name, and no express reference was made to the earlier trial (R. 9, 12–13). Petitioner then moved to quash the panel on the ground that the court's action had conveyed the impression that jurors would be called into the court's chambers to discuss their verdict if they acquitted a criminal defendant (R. 7–10).

At a hearing on the motion the judge stated that he had inquired of the four members of the panel whether they had given thorough consideration to the case and whether any outside influence had been brought to bear upon them. Petitioner's counsel then questioned the four former jurors out of the presence of the remainder of the panel. They all denied that they had discussed their conference with the judge with any other members of the panel. The four former jurors were then removed from the panel from which petitioner's jury was chosen (R. 15–25).

2. The government's evidence may be briefly summarized: Hector Rodriguez, a cabdriver from Monterrey, Mexico, testified that he met petitioner and co-defendant Nicolas Borozzi on a Monterrey street one Sunday afternoon in April 1962. Borozzi asked him where he could get marihuana. Rodriguez then introduced him to a seller. On the following day the marihuana was delivered, and the four met at the Regina Motel with another Mexican, Verduzco, who agreed to carry it across the border if he were well paid

(R. 26–35). Petitioner then tried to transfer the marihuana from a sack to a blue suitcase, but it would not fit into the suitcase. Borozzi succeeded in squeezing the marihuana into the suitcase, and he then paid the seller (R. 36, 37, 43).

In petitioner's presence Borozzi and Verduzco discussed the best way to bring the marihuana across the border. Verduzco suggested that he take it by bus to Nuevo Laredo (R. 37–39). Borozzi engaged Rodriguez to accompany Verduzco, paying him twenty dollars (R. 41). Petitioner gave Rodriguez a pistol (introduced into evidence) and two boxes of cartridges (R. 43–44). All four then went to the bus stations to inquire about bus departures for Laredo (R. 45–46). After checking out of the motel, they returned to the bus station. The two Mexicans boarded the bus, taking the suitcase and agreeing to meet Borozzi and petitioner at Nuevo Laredo (R. 46).

The bus arrived at Laredo at about 6:30 or 7:00 a.m. Borozzi took charge of the suitcase, and all four checked into the Vera Cruz Hotel. In petitioner's presence, Borozzi and Verduzco again discussed how to take the marihuna across the border. When Verduzco advised that it should be transported in the innertube of a tire, petitioner went to the American side of the border to obtain one (R. 47–49). That evening, all four met near the river, where Verduzco and Borozzi talked together outside the car for about forty-five minutes. Verduzco told Rodriguez that the marihuana would cross at eight o'clock. Rodriguez

then went back to the hotel and saw no more of Borozzi or petitioner (R. 50–51).

Shortly after 8:00 p.m. on April 10, 1962, about a half mile down river from the International Bridge at Laredo, American border patrol officers heard a whistle on the American side of the river, followed by a similar whistle on the Mexican side. A man was seen coming out of the brush on the Mexican side, and then was observed swimming across. After dressing, he started through the brush, carrying a suitcase. He was apprehended and eventually identified as Borozzi. The suitcase was filled with marihuana (R. 64–67, 103).

On April 12, customs officers interviewed petitioner at an address in Baltimore, Maryland, where Borozzi lived. Petitioner said that he was there to see his wife, who was helping care for a baby recently born to the woman living with Borozzi. Petitioner then stated that he had not been out of Baltimore "for weeks." At a later interview, he admitted that he had gone to Mexico with Borozzi, who had offered him $100 to drive him there. He said they were making the trip "to cop some pot and get high" (R. 87–88, 93, 96–97).

Petitioner testified in his own behalf that at the invitation of Borozzi he had gone on a vacation trip to Mexico, with the intention of smoking marihuana while there (R. 105). He testified that he had no proprietary interest in the marihuana, but had helped packed it in the suitcase at Borozzi's request (R. 114).

3. On cross-examination, petitioner was asked

whether his employment as a bartender was his sole source of income. He replied that it was. He admitted knowing a woman named Sarah Shapiro or Sally O'Malley, who was a barmaid at a night club. At this point, petitioner's counsel objected to the line of questioning on the ground that "I don't know what they are going to bring out." Government counsel stated that he wanted "to show that he does have other means of income." The court permitted the inquiry to proceed (R. 120–121). Petitioner was then asked, "She is also a prostitute, is she not?" He replied, "I don't know." In answer to further questions, petitioner admitted that he had borrowed money from this acquaintance occasionally, that she had lent him the money for a down payment on the car which he drove to Mexico, and that she owned the car (R. 120–122). At no point during this inquiry was there any other objection by petitioner's counsel.

4. In summation, petitioner's counsel argued (R. 151):

> But they said they must have gone down there to get marihauna. Now, where is a shred of evidence that this boy had a market for eighteen pounds of marihuana in Baltimore? Oh, he used marihuana, he smoked marihuana, and he admits it. But eighteen pounds of marihuana portends a commercial venture; and where is the slightest shred of evidence that this fellow had a market for eighteen pounds of marihuana?

Government counsel responded to this argument in rebuttal as follows (R. 166):

> They asked you the question, would this man have a market for eighteen pounds of marihuana? I submit he has. As a bartender in Baltimore, he could sell it just every day. If you are working Sally O'Malley, you can certainly get rid of it.

Petitioner's timely objection to this argument was sustained, but a motion for a mistrial was denied (R. 166). In charging the jury, the court said (R. 181):

> There has been testimony referred to in the argument by the Government's counsel which suggests that he perhaps was living in part at least off the earnings of a prostitute. He is not charged with that offense. It is an irrelevant matter which apparently crept in when I was unaware as to what was coming. I will ask you not to consider that testimony as to that circumstance for any purpose.

## ARGUMENT

1. Contrary to petitioner's contention (Pet. 5), the evidence did not make this case "a close one." Petitioner was present during at least two discussions between Borozzi and Verduzco regarding the preferable method for smuggling the marihuana. He admitted having assisted in packing the narcotics into the suitcase which he lent to Borozzi (R. 133). He

neither denied nor explained his action in giving a revolver and cartridges to Rodriguez. This evidence, together with whatever inferences the jury could draw as to the purpose of petitioner's quick trip from Baltimore to Mexico, was certainly sufficient to sustain petitioner's conviction for conspiracy—the only charge submitted to the jury.

2. The private interrogation of the four jurors who had served in the earlier case could not possibly have prejudiced petitioner, and the court of appeals was correct in considering that contention "farfetched, indeed, frivolous" (Pet. App. 4). The remainder of the panel knew only that four members—identified by name and not by their participation in the earlier trial—had been asked to speak to the judge. None of those interrogated spoke to the other members of the panel regarding the subject of their interview, and there is not the slightest reason to believe that any other member of the panel thought that the interview was related to the previous jury service of the persons who were thus singled out. The four were stricken from the list of possible jurors for petitioner's case, so that their personal reactions to the court's interrogation could not have prejudiced petitioner.

3. In light of the strong evidence of guilt and the failure of petitioner's counsel to make timely objections, the court of appeals properly concluded that the district court's instructions cured whatever prejudice might have been caused by the improper cross-examination and rebuttal argument by government counsel. The instruction clearly informed the jury that it was

"not to consider that testimony as to that circumstance for any purpose" (R. 181).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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*Solicitor General.*
HERBERT J. MILLER, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
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AUGUST 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 261

CARL MICHAEL MIRABILE,
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v.

UNITED STATES OF AMERICA,
*Respondent.*

## Brief for Petitioner In Reply to Brief for the United States in Opposition

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**Brief for Petitioner In Reply to Brief for the United States in Opposition**

## ARGUMENT

**I. This was a close case.**

The Respondent, in its effort to minimize the effect of the prosecutor's admitted misconduct, urges this Court to view this case as one in which there had been "strong evidence of guilt," relying heavily upon the fact that the Petitioner accompanied Nicholas Borozzi to Mexico.

It was undisputed that in the first days of April, 1962 the Petitioner and Borozzi took a trip from Baltimore, Maryland, to Mexico, and that, on the evening of April 10th, Borozzi alone was arrested after he crossed the Rio Grande near Laredo, Texas, with a suitcase full of marihuana. The theory of the prosecution was that the two had been in

Texas while parties to a smuggling scheme, and that Borozzi, when he was arrested, was acting in furtherance of the joint venture. The defense, on the other hand, maintained that Mirabile took the trip for pleasure and that he abandoned Borozzi after the latter had unexpectedly purchased eighteen pounds of marihuana in Monterrey, Mexico and made clear his intention of bringing it into the United States.

Although the prosecution charged that the sole purpose of the trip to Mexico was the procurement of marihuana for smuggling, no evidence was introduced by the Government of any event prior to the entry of the defendants into the Republic of Mexico on April 7, 1962. The Petitioner's testimony, which was uncontradicted, was that in the first days of April, his friend, Borozzi, informed him that he was planning a pleasure trip to Mexico and invited him to come along. Borozzi offered to loan him the money for the trip if he would supply the car, and since he had not had a vacation in several years, he accepted the offer (R. 104-105, 122-123, 132). Borozzi was in need of a suitcase to carry his clothes, and the Petitioner obtained one from his girl friend, a girl named Jacqueline Gay, which was loaned to Borozzi for his use (R. 132-133).

The two men left on a Thursday afternoon, and, between 8:00 and 9:00 o'clock on Saturday evening, they arrived at Laredo, Texas, entering Mexico at that point (R. 105). The defendants drove to Monterrey, Mexico, and, on the day after their arrival, they met Hector Rodriguez, a tourist guide. Rodriguez himself conceded that the Petitioner did not seek him out or solicit him in any way, but that he called to Borozzi and Mirabile as they were driving down the street, stopped them, and offered to get them anything they wanted (R. 54). Mirabile testified that Borozzi, in

response to Rodriguez's offer, asked for marihuana to smoke and that Rodriguez then introduced Borozzi to a friend of his named Jesse (R. 108).

After the introduction to Jesse, the Petitioner said, Borozzi went away with Jesse and left him with Rodriguez (R. 108). Mirabile admitted, quite candidly, that he had smoked marihuana in the past and that he assumed that Borozzi "was just going to get some stuff to smoke while we were down there." Half an hour later, Borozzi returned. He informed Mirabile that he had given "some money" to Jesse, but no mention was made about any large quantity of marihuana (R. 109).

After Borozzi's return from his private meeting, his activities with Mirabile were those of a tourist. Together with Rodriguez, they went to the bull fights, to a restaurant and, later, to a waterfall where they went horseback riding. (R. 109). The next day, after more sightseeing, the defendants met Rodriguez for a second time, and they went to a pool room with him. While they were playing pool, Jesse arrived for another private meeting with Borozzi and the two of them conferred carefully out of Mirabile's hearing. Turning to Mirabile when he had finished talking with Jesse, Borozzi announced, "We're going to move out of the Favorita Hotel into the Roegina Apartments" (R. 111). Because the finances were controlled by Borozzi, there was little that Mirabile could do but comply with the instructions given to him (R. 114).

Borozzi, in a conversation with Rodriguez which was also apparently out of Mirabile's hearing, asked Rodriguez if he would bring marihuana to the United States for him. Rodriguez declined to do the job himself, but he introduced Borozzi to his friend, a man named Verduzco, who, after

discussion with Borozzi, undoubtedly associated himself with the latter's venture (R. 35, 56).

Borozzi and Jesse went away again, leaving Mirabile with the instruction that he was to meet them at the Motel Roegina. They found Borozzi and Jesse emptying a large quantity of marihuana from a cardboard box into pillow cases. It was Mirabile's uncontradicted testimony that he had no proprietary interest in that marihuana and that none of his money was used to buy any of it. Before he entered the Motel Roegina, Mirabile said, he had no idea that Borozzi had so much marihuana and he had never seen that much in his life (R. 112-114).

Mirabile said that Borozzi asked him to transport the marihuana in the tires of his car, but that he refused and that the two of them got into an argument (R. 115). Finally, Mirabile recounted, Borozzi accepted his refusal to engage in the smuggling, saying, "Well, take me to Laredo, and I'll give you twenty dollars and you can go" (R. 115).

With certain exceptions, the Government's witness Rodriguez supported Mirabile's account of the events in Monterrey. He conceded that when he stopped the defendants on the street and asked them if they wanted anything, Mirabile spoke to him only about the sights of Monterrey and what there was to see there. Thereafter, he said, it was Borozzi who asked him for the marihuana and directed him to introduce him to Jesse (R. 54). He admitted that at their first meeting Borozzi and Jesse conferred alone and that Mirabile, who displayed no interest in the conversation and who was not invited to participate, stood aside, and that, shortly thereafter, Borozzi and Jesse went away, leaving Mirabile behind (R. 30). At the pool room the next day, he also said, Jesse and Borozzi again conferred out

of Mirabile's hearing and, once more, they went away for "quite some time" without inviting Mirabile along (R. 34). At the Motel Roegina he related, it was Borozzi who paid money to Jesse and it was Borozzi who, singlehandedly, planned the smuggling operation with Verduzco, the man who was to bring the marihuana across the border (R. 37-39). The agreement, he said, was made between Borozzi and Verduzco that the marihuana would be brought in through Laredo, and Rodriguez conceded that Mirabile took no part in the discussion (R. 37-39). Mirabile's undisputed disinterest in both the purchase of the marihuana and the plans for its importation militate strongly against the suggestion that he was a partner in Borozzi's criminal enterprize. On cross-examination, moreover, Rodriguez testified that only Borozzi spoke to him about transporting the marihuana to the United States:

> "Q. Who asked you to transport the marihuana to the United States? A. Nick.
>
> Q. Only Nick? A. Yes, sir, because he was the one that offered to pay me.
>
> Q. Didn't you tell Senor Martinez that both of these fellows asked you to bring the marihuana across? A. No, sir.
>
> Q. You deny that? A. Yes, I remember only Nick" (R. 55).

He corroborated, further, the facts that Borozzi asked Mirabile to put the marihuana in his car, that Mirabile refused, and that Borozzi became angry at Mirabile (R. 59).

The marihuana was packed in a suitcase and it was given to Rodriguez and Verduzco who left by bus for Nuevo Laredo, a Mexican town located across the Rio Grande from Laredo. Mirabile drove Borozzi to Nuevo Laredo, arriving there early in the morning of April 10th (R. 46).

The testimony of Rodriguez and Mirabile as to the events of April 10th, the date on which Borozzi was arrested, was in conflict. Mirabile insisted that he abandoned the conspirators in Nuevo Laredo early in the morning; that he entered the United States at Laredo, Texas where he sent a telegram home; and that he drove back to Baltimore. Rodriguez, on the other hand, claimed that Mirabile was with him in Nuevo Laredo late that day, shortly before Borozzi attempted to cross the river, and, with this as its basis, the Government maintained that Mirabile was probably waiting for Borozzi to cross the river and that he must have left Laredo after the latter had been arrested.

Mirabile's version was corroborated by the testimony of Mr. Ray B. Wright, a health inspector with the United States Public Health Service who was stationed, on April 10th, at the International Bridge at Laredo. It was part of his duties, Mr. Wright said, to vaccinate all persons entering the United States from the interior of Mexico. He produced his records for that day, and, from them, he determined that Mirabile was vaccinated as he entered the United States "between 7:00 and 8:00 in the morning" (R. 61-63).

Mr. A. L. Williams, the manager of the Laredo, Western Union station, produced, from his records, the original telegram which Mirabile sent to Baltimore to his cousin, Mrs. Roberta Mirabile. As Mr. Williams explained, an electric time stamp marks the original telegram when a message is first given for transmission, and the telegram sent by Mirabile was marked, "April 10, a.m. 8:17" (R. 140). The message, which is not without significance, was: "Arrived safely, everything O.K. Will be in Wednesday or Thursday. Love, Carl" (R. 140). April 10th was Tuesday. If, as the prosecution contended, Mirabile remained in the

area until some time after 8:00 p.m., waiting for Borozzi to cross the river, he would have had to have expected to be able to drive the almost 2,000 mile distance to Baltimore in one day. This, of course, is an acknowledged physical impossibility, and the Government never attempted to reconcile the telegram with its prosecutive theory.

Rodriguez, who contradicted Mirabile, claimed that after he and Verduzco arrived by bus in Nuevo Laredo in the morning of April 10th and met Borozzi and Mirabile, the four of them checked into a hotel named the Vera Cruz. He maintained that he and Verduzco first rented a room and that "after a while they [Borozzi and Mirabile] came in, and rented the room next to us" (R. 48). If Mirabile had lingered in Nuevo Laredo that day, the most damaging evidence of this fact would have been the hotel register. No such register was ever produced, however, and no explanation for its absence was ever given.

Rodriguez testified that he and Verduzco arrived in Nuevo Laredo about 7:30 or 8:00 o'clock in the morning (R. 59). After the four of them went to the Vera Cruz Hotel and registered in two stages, he said, Mirabile spent approximately an hour and a half with him (R. 59). Then, he claimed, Mirabile went across to Laredo to buy an innertube on which the marihuana would be floated across the river, and, he maintained, Mirabile returned later (R. 49). This aspect of Rodriguez's testimony is suspect for at least three reasons. First: if the events had transpired as he claimed they did, Mirabile would not have reached the United States until some time after 9:30 a.m., more than an hour and a half later than the time fixed by the independent, reliable witnesses from the Public Health Service and the Western Union. Second: when Rodriguez was interviewed by a representative of the Customs Service

shortly after Borozzi had been apprehended and he gave a full report of what had allegedly transpired, he made no claim that Mirabile was the person who procured the innertube (R. 59). It seems unlikely that this important bit of evidence could have been forgotten by Rodriguez so shortly after the offense. Third: if Mirabile had, in fact, purchased the innertube in Laredo, Texas, a small town, it would not have been difficult for the Government to have located the person who sold it to him. The alleged seller was never produced, however, and the Government relied entirely upon the uncorroborated testimony of Rodriguez. More likely than not, Rodriguez himself was the procurer of the innertube and, in an attempt to exculpate himself, he shifted the blame to Mirabile (R. 60-61).

Shortly after 8:00 p.m. Borozzi was observed by members of the United States Border Patrol as he swam toward Laredo, Texas across the Rio Grande, pushing an innertube on which the suitcase of marihuana was perched (R.65-6). He was arrested a few minutes after he emerged from the water (R. 67). At the time of his arrest he was wearing a pair of pants and shoes and he had a sport shirt in his hip pocket (R. 69). In his pants pocket he had $297.00 in cash (R. 71), and he also had a wrist watch with him (R. 86). It is unlikely that he would have carried these valuables with him if they could have been given to a companion waiting to drive him home. Borozzi was taken to the county jail, and, after he was left there, the investigating officers returned to the river where they continued their surveillance without success. Neither Mirabile nor the automobile which he had been driving were observed (R. 82-83).

Forty-two hours after Borozzi's arrest, while Customs agents were at Borozzi's house in Baltimore, interviewing

the occupants, Mirabile arrived. The fact that Mirabile was back in Baltimore so soon after the arrest was bothersome to the Government, and the prosecutor argued that the defendant drove the entire distance from Texas to Baltimore without resting or even stopping for two entire days (R. 161). The Petitioner identified himself to the Customs agents, making no attempt at disguise. He surmised that Borozzi's ve. ure had failed, however, and because he did not want to be put in the position of being called upon to testify against a friend, he denied having been in Mexico with Borozzi (R. 118).

The Customs agents left, and when they returned the next morning, April 13th, they found Mirabile there with his girl friend, Jacqueline Gay. He had made no attempt to flee. Later that day, Mirabile, in response to a request, voluntarily appeared at police headquarters in Ba timore. He was formally interviewed by a Customs agent, and in the course of the interview he admitted that he had been in Mexico with Borozzi. He related that Borozzi had invited him to go to Mexico with him and that he had expected to smoke marihuana there (R. 97-98). On questioning, he revealed that he had left Borozzi in Mexico after an argument developed when the latter asked him to bring the marihuana into the United States in his car (R. 99-100). The Customs agent and two police officers searched the defendant and the automobile meticulously, extracting sweepings from various portions of the automobile. No marihuana could be found (R. 100-102).

The District Judge saw the witnesses and was able to assess their demeanor. If he had found Rodriguez's testimony of the events of April 10th entirely acceptable, he would not have entered a judgment of acquittal on the substantive charges against the Petitioner. Only the con-

spiracy charge was allowed to go to the jury, however, and the Petitioner was convicted only of this charge.

The indictment charged that the Petitioner committed crimes within the Southern District of Texas, and, as the District Judge properly instructed the jury, it was necessary for the Government to prove, beyond a reasonable doubt, that the Petitioner was a party to the alleged criminal enterprise when he left Texas for Mexico or when he returned to Texas from Mexico. The Government had a greater burden than that of merely showing that the Petitioner came to Mexico with Borozzi, for, as the Court declared in *Ingram v. United States*, 360 U.S. 671, 678 (1959), "Conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." (Court's own emphasis). See also *Cuthbert v. United States*, 278 F. 2d 220 (5 Cir., 1960), where it was held that evidence of the defendant's association with a smuggler in a brief trip from Washington, D. C. to Laredo, Texas and Nuevo Laredo, Mexico and the presence of marihuana tracings on the defendant's clothing would not be sufficient to establish that the defendant had joined in a conspiracy to smuggle. See also: *United States v. Euphemia*, 261 F. 2d 441 (2 Cir., 1958); *Panci v. United States*, 256 F. 2d 308 (5 Cir., 1958); and *René v. United States*, 209 F. 2d 893 (5 Cir., 1954).

**II. The prosecutor's admittedly improper conduct persisted in spite of Petitioner's protests.**

The cross-examination of the Petitioner was marked by persistent and unjustified insinuations and accusations, some of which were wholly irrelevant to the charge and none of which were followed by any evidence. The prose-

cutor contented himself with suggestions that facts prejudicial to the defendant but not in evidence were known to the Government.

The first set of questions put to the Petitioner was designed to show the jury that he was a debased person who was living, in part at least, from the earnings of a prostitute. The prosecutor asked the Petitioner if he had any income other than that derived from his employment at his mother's tavern, and the Petitioner replied that he had none (R. 120). He then inquired whether the Petitioner knew a woman named Sarah Shapiro or Sally O'Malley. Counsel for the Petitioner objected to the question and asked the Court for a conference at the bench (R. 121). Without waiting for the Judge to afford counsel the opportunity to have the objection aired and a proffer made out of the presence of the jury, the prosecutor interjected: "Your Honor, the defendant has stated he had no other means of income. We intend to show he does have other means of income" (R. 121). Although counsel for the Petitioner protested that the prosecutor was merely offering to rebut an issue which he himself had raised, i.e., whether or not the defendant had other means of income, the Court permitted the line of cross examination to continue over objection (R. 121).

The Petitioner, in response to further inquiry, identified the woman in question as a barmaid at a night club in Baltimore and a person who had loaned him money from time to time and with whom he was purchasing a car. The prosecutor thereupon suggested that she was a prostitute working for the Petitioner and that the Petitioner shared in the earnings from the alleged prostitution. He said, "She is also a prostitute, is she not?" When the defendant replied that he did not know, the prosecutor pursued him with the question, "You don't know; you have never

received any money from her?" (R. 121). The Petitioner answered that he had borrowed money from her and that the two of them had been paying for a car together. Contrary to his representation to the Court, the prosecutor made no further effort to prov that the defendant had other means of income. The irrelevancy of this issue, moreover, demonstrates that the prosecutor could have had no other purpose than to impress the jury that the Petitioner was of such immoral character that he was capable of committing the crime charged and that he had, therefore, probably done it. His motive was made clear when, as will be developed below, he argued to the jury, without proof, that the defendant was "working" the woman who he claimed was a prostitute.

Aware of the fact that he had presented no evidence of any events in Baltimore prior to the trip which would tend to show that the Petitioner entered the conspiracy there, the prosecutor sought to supply the defect by suggesting to the Petitioner, without any intention of offering proof, that he, and not Borozzi, had initiated the smuggling scheme. He declared, "Isn't it true that in fact you did not—you were not approached by Nicholas Borozzi to come down here, and you approached him and told him you had the name of a man in Monterrey that could get some pot for you; you wanted him to go with you?" (R. 124-125). The Petitioner denied the suggestion, and, hinting that he had some secret source of information, the prosecutor asked, incredulously, "That isn't true?" When the Petitioner reiterated his denial, the prosecutor then asked if it was not true that the defendant had a friend in Baltimore whose last name was Hernandez (R. 125). The Petitioner replied that he did, in fact, have a friend by that name, and, insinuating that this friendship with a person of apparent

Spanish extraction assumed some sinister significance, the prosecutor underscored the name and said, "Hernandez; and he is a good friend of your, isn't he?" (R. 125). The Petitioner's friend was, the record shows, an automobile salesman who had no connection at all with either Borozzi's crime or the defendant's alleged participation in it. There was no effort made to prove any such connection and, as the record demonstrates, there was no basis for the prosecutor's insinuation. Surely, if there had been some foundation for it, Borozzi, who had already entered his plea, would have been called to the stand by the Government as part of its direct case or, at least, in rebuttal and the Petitioner would have had an opportunity to cross-examine him. Instead, the tactics of the prosecutor placed the Petitioner in a position where he was contradicted by an unsworn witness who could not be cross-examined.[3]

The prosecutor assailed the Petitioner's character further with an attempt to demonstrate to the jury that even at the time of trial he was guilty of immoral conduct. The Petitioner was asked the name of his girl friend and he replied, "Jacqueline Gay". The prosecutor inquired if she was then in Laredo, and, when the Petitioner said that she was, the prosecutor asked him to name the motel at which she was staying and the number of her room. When the defendant answered that she was staying in Room 306 of the La Posada Motel, the prosecutor quickly countered with the question, "What room are you staying in?" (R. 132). Counsel for the Petitioner objected to the obvious

[3] Other suggestions, implying an undisclosed source of reliable information, were made by the prosecutor throughout the cross-examination. At one point, for example, he said, "In fact, isn't it true that just prior to your leaving for down here, about three or four days prior to that, you and Nick Borozzi went down by the waterfront and smoked some marihuana, isn't that correct" (R. 124). The defendant denied the assertion, and it too was never followed up by proof.

irrelevancy and the objection was sustained, but the inference was unmistakable and the desired prejudicial effect was the same as if the question had been answered. This inquiry into a matter wholly foreign to any legitimate issue in the case could not have been made in good faith.

At the conclusion of the case for the defense, the Government presented no further evidence, and prior to the jury arguments, the District Judge held a hearing in his chambers. At this hearing, counsel for the Petitioner filed with the District Judge a requested instruction which would not reiterate the prejudicial material but which would simply remind the jury that, "The defendant is not on trial for any act or conduct not alleged in the indictment" (Supp. R. 5). Counsel for the Petitioner was disturbed by the tactics which were being employed against his client and he complained, "Your Honor, they are trying to show the fellow is living with people in hotel rooms, and has a girl friend named Sally O'Malley, and I think the prosecution attempted to bring in all sorts of misconduct not a part of this indictment" (R. 138). The District Judge replied only that he would think about the proposed instruction "a little bit" (Tr. 192). The prosecutor, as his subsequent conduct demonstrated, was unaffected by the defendant's protest.

In his argument to the jury, defense counsel emphasized the lack of evidence of events prior to the entry of the defendant into Mexico and the absence of any proof that the Petitioner could utilize such a large quantity of marihuana as was found upon Borozzi. He told the jury:

> "If you entertain any reasonable doubt, when you are in that jury room, it is your duty as jurors not to convict him.

"Now, a reasonable doubt can come in your minds, as His Honor will charge you, in a number of ways: Either in flaws in things that the Government tries to bring in, or in the proof that the defendant brings in, or even in the failure of the Government to produce evidence that they could have or should have produced.

"Now, they start out and they say these two boys came to Mexico. Well, everybody agrees they came to Mexico. You didn't hear any objections when the evidence went in about them coming in to Mexico. Nobody said that they weren't.

"But they said they must have gone down there to get marihuana. Now, where is a shred of evidence that this boy had a market for eighteen pounds of marihuana in Baltimore? Oh, he used marihuana, he smoked marihuana, and he admits it. But eighteen pounds of marihuana portends a commercial venture; and where is the slightest shred of evidence that this fellow had market for eighteen pounds of marihuana?

"Now, who was here? Mr. Riley was here from Customs, Mr. Loughman was here from Customs, from Baltimore. You saw Lt. Simonson from Baltimore. Probably the best investigators you will ever find. And if there was evidence of a ready market in Baltimore, Maryland, for this defendant, you would have seen that evidence on the witness stand. But there wasn't any" (R. 150-151).

The flaw in his case having been pointed out, and there being no evidence from which a counter argument could be made, the prosecutor, in an act of desperation, departed from the record and returned to his unproven claim that the defendant was a panderer and that a person who plied that contemptible trade had a ready market for marihuana. In his final argument, when the Petitioner had no opportunity to reply, the prosecutor declared:

> "They ask you the question, would this man have a market for eighteen pounds of marihuana? I submit he has. As a bartender in Baltimore he could sell it just every day. *If you are working Sally O'Mally, you can certainly get rid of it.*" (R. 166) (Emphasis supplied).

Counsel for the Petitioner objected immediately, protesting to the Court that the remark constituted misconduct. The objection was sustained without any admonition or comment by the District Judge, and, thereupon, the defendant moved for a mistrial. The motion was promptly overruled, and the prosecutor, enheartened by the lack of any restraint upon him, abandoned the evidence altogether and exclaimed, "He had a ready market for it, *I'm quite certain of that*, he and Nicholas Borozzi both." (R. 166-167) (Emphasis supplied).

Some time later, the District Judge, who had apparently realized the prejudice produced by the prosecutor's conduct, attempted to remedy it in the course of his charge. The Judge's comment, however, was such that, if anything, it compounded the error. If the significance of the prosecutor's argument had escaped any of the jurors, the Judge's remark brought it home. He referred to the prosecutor's unsupported suggestion as if it were evidence in the case, moreover, and, instead of firmly admonishing the jury to disregard it, he simply requested them to do so. He said:

> "There has been *testimony* referred to in the argument by the Government's counsel which suggests that he perhaps was living in part at least off the earnings of a prostitute. He is not charged with that offense. It is an irrelevant matter which apparently crept in when I was unaware as to what was coming. I will *ask* you not to consider that testimony as to any circumstance for any purpose." (R. 181) (Emphasis supplied).

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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